

**Reserved
COURT NO.7**

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL
Criminal Appeal No. 787 of 2001
(Old Case No. 2349 of 1991)

Gajpal Singh, son of Shri Kundan Singh,
Resident of Village Kyark,
Patwari Circle Chandrapuri,
Tehsil Ukhimath, Distt. Chamoli

.....Appellant

Versus

State of U.P.

.....Opposite Party

Sri Lokendra Dobhal, learned counsel for the appellant
Sri M.A. Khan, learned brief holder for the state.

Dated:11.12.2007

Hon'ble Dharam Veer, J.

This criminal appeal, preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) is directed against the judgment and order dated 29.11.1991 passed by Sessions Judge, Chamoli at Gopeshwar in Sessions Trial No. 15 of 1991, State v. Gajpal Singh and another, whereby the learned Sessions Judge has convicted appellant Gajpal Singh under Sections 354 and 376 of The Indian Code, 1860 (hereinafter referred to as I.P.C.) and awarded sentence for one years' R.I. under Section 354 I.P.C. and ten years R.I. under Section 376 I.P.C. and it has been directed that both the sentences shall run concurrently and co-accused Prem Singh has been acquitted for the offence punishable under Sections 354 & 376 I.P.C.

2. In brief, the prosecution case is that on 16.08.1989 at about 8.00 P.M., victim Smt. Darshani Devi was preparing food in her house and her mother-in-law was also sitting there and then the accused-appellant Gajpal Singh and accused Prem Singh had reached there and they took liquor there and the mother-in-law of the victim had also taken liquor with both Gajpal Singh and Prem Singh. After sometimes of taking the liquor accused Prem Singh felt hangover then appellant Gajpal Singh told him that he should go up-stairs and should take a sleep in the room. Prem Singh went up-stairs to the house and slept there. Thereafter, accused-appellant Gajpal Singh took meals along with victim Smt. Darshani Devi and he also went in the room up-stairs of the house of the victim. Victim Smt. Darshani Devi cleaned the utensils and also took food and after that she went in her room to sleep, just then she saw that accused Prem Singh was lying down in the outer room of her mother-in-law. When victim Smt. Darshani Devi went in her room, accused Prem Singh also entered there and started teasing her. Victim Smt. Darshani Devi told accused Prem Singh that she was his aunt and it was not proper for him to tease her, then accused Prem Singh silently came out of her room. After some time, accused Gajpal Singh had entered in the room of victim Smt. Darshani Devi and the accused-appellant Gajpal Singh lay down in the bed beside Smt. Darshani Devi. When the victim tried to raise alarm, Gajpal Singh gagged her mouth and forcibly torn the petticoat and baniyan of the victim and committed rape with her. When victim Smt. Darshani Devi again tried to raise alarm, accused-appellant Gajpal Singh assaulted on her head and face with a torch due to which the blood was oozing from the wound and

threatened the victim not to raise alarm and thereafter he ran away from there. On 17.08.1989, Victim Smt. Darshani Devi made a complaint to the Pradhan of Gram Sabha Kyark regarding the occurrence, carbon copy of the said complaint is Ex.Ka-2. On the said complaint of the victim, a panchayat of the villagers was convened by the Gram Pradhan and an application signed by Mohan Singh, Bhupal Singh and others was given to Sub Divisional Magistrate, Ukhimath, District Chamoli for taking appropriate action against the accused, the application is Ex.Ka-3. On 17.08.1989, Victim Smt. Darshani Devi was taken to the Government Hospital, Ukhimath for medical examination but she was advised to go to Government Hospital, Augustmuni for her medical examination and there too her medical examination was not conducted and she was again advised to go to the Government Hospital, Gopeshwar for medical examination. Then she went to Gopeshwar, District Chamoli on 25.08.1989 and filed an application regarding the said occurrence under Section 156 (3) Cr.P.C. i.e. Ex.Ka-1 in the Court of Chief Judicial Magistrate, Chamoli and on the same date her medical examination was conducted in the Government Hospital, Gopeshwar by Dr. Mayank Upadhyaya, who prepared the medical report i.e. Ex.Ka-4. On the application moved under 156 (3) Cr.P.C., Learned C.J.M. Chamoli vide order dated 25.08.1989 directed the Patwai of the Patwari Circle Chandrapuri, Tahsil Ukhimath, District Chamoli to register the case against the accused under Sections 354 and 376 I.P.C. and to make investigation in the case thereafter and to submit the report. The order dated 25.08.1989 passed by C.J.M., Chamoli is Ex.Ka-5. In compliance of the order of learned C.J.M. Chamoli,

Patwari Garib Dass prepared a Chik F.I.R. on the basis of the typed report Ex.Ka-1 on 27.08.1989, the Chik F.I.R. is Ex.Ka-6 and entry was also made in the G.D., the copy of G.D. is Ex.Ka-7 (in the rural areas of hill Districts of Uttarakhand the Patwaris are vested with the police powers). On 28.08.1989, on the pointing out of victim Smt. Darshani Devi, Patwari (Investigating Officer) inspected the place of occurrence and prepared site plan i.e. Ex.Ka-8 and at the same time at the place of occurrence, he took one petticoat i.e. Ex.1, one blouse i.e. Ex.2 and one swatter i.e. Ex.3 of the victim. The Patwari also collected 23 broken pieces of glass bangles of the victim from the spot i.e. ex.-4 and prepared *Fard* i.e. Ex.Ka-9. The Patwari also recorded the statements of the witnesses during the course of the investigation. After completing the investigation, he submitted the charge sheet against the present appellant and co-accused Prem Singh, who has been acquitted by the trial court, that charge sheet is Ex.Ka-10.

3. Learned Chief Judicial magistrate, Chamoli committed the case to the Court of Session on 11.04.1991 under Section 209 Cr.P.C. after complying the provisions of Section 207 Cr.P.C.

4. Learned Sessions Judge, Chamoli framed charges against appellant Gajpal Singh and co-accused Prem Singh under Sections 354 & 376 I.P.C. on 27.05.1991 and the charges were read over and explained to the appellant and co-accused who pleaded not guilty and claimed to be tried.

5. To prove its case the prosecution examined Pl.W.1 Smt. Darshani Devi (victim and complainant of the

case), P.W.2 Gajendra Singh, P.W.3 Indra Singh, P.W.4 Umed Singh, P.W.5 Dr. Mayank Upadhyaya and P.W.6 Garib Dass, Patwari (Investigating Officer). After that the statement of the appellant and co-accused were recorded under Section 313 Cr.P.C., who denied the allegations made against them and in defence they did not produce any oral or documentary evidence.

6. After appreciating the evidence on record and hearing learned counsel for both the parties, learned Sessions Judge, Chamoli has convicted appellant Gajpal Singh under Sections 354 and 376 I.P.C. and awarded sentence for one year's R.I. under Section 354 I.P.C. and ten year's R.I. under Section 376 I.P.C. and it has been directed that both the sentences shall run concurrently and co-accused Prem Singh has been acquitted for the offence punishable under Sections 354 & 376 I.P.C.

7. Against the said judgment and order, the appellant has preferred the instant appeal.

8. I have heard Sri Lokendra Dobhal, learned counsel for the appellant as well as Sri M.A. Khan, learned brief holder for the State and perused the entire record of the trial court.

9. To prove its case the prosecution has examined P.W.1 Smt. Darshani Devi, who is the victim and complainant of the case has stated in her statement that accused-appellant Gajpal Singh and co-accused Prem Singh belong to her village and Gajpal Singh is her Jeth and Prem Singh is her nephew as per the village relationship. The whereabouts of the husband was not

known for two and half years. Her mother-in-law, who was blind, was living in her house alongwith her and no one was living there except the two and she was illiterate. She has further stated that the occurrence had taken place about one and half years before in the night. At that time she was preparing food in her house and Gajpal Singh and Prem Singh had reached there. When she inquired from them that from where they had come, Prem Singh answered that he had come from the place of worship. Both Gajpal Singh and Prem Singh took liquor in her house and they also gave liquor to her mother-in-law. Thereafter, Prem Singh complained that he was not feeling well, then Gajpal Singh told him to go up-stairs for sleeping. After that, Gajpal Singh took meal and he also went in the room situated at the first floor of the house. She also took the meal and cleaned the utensils and thereafter, she inquired from both the accused why they had not gone to their houses then they replied that they would go at 11:00 P.M. Thereafter, she went in her room and lay down there where Prem Singh came and started to tease her. On this, she told to Prem Singh that she was like his mother and she has further stated that she is aunt of Prem Singh and then Prem Singh went out of her room. A kerosene oil lamp was burning inside her room and the doors of the room were closed but there were no latches. She has further stated that Gajpal Singh came to her room and gagged her mouth and committed rape with her and also assaulted on her head and nose with torch and also threatened to kill her on raising alarm. She has further stated that she made an alarm and on his alarm, Gajendra Singh came and Gajpal went to the room situated at outside to threaten her mother-in-law. The house of Gajendra Singh is

situated at the left side of her hosue. She made complaint about this occurrence to the Gram Pradhan and she went to Ukhimath for medical examination where she was told to go to Government Hospital at Augustmuni and when she went to Augustmuni, she was again told that she should go to Gopeshwar. Then, she went to District Hospital, Gopeshwar where her medical examination was conducted and she also submitted an application before the Chief Judicial Magistrate at Gopeshwar after putting her thumb impression on it and that application was read over and explained to her and then she put her thumb impression. She proved the application as Ex.Ka-1. She further stated that she handed over her petticoat and blouse to Patwari.

10. P.W.2 is Gajendra Singh, who has stated that he knows Smt. Darshani Devi, who lives nearby his house. The husband of Smt. Darshani Devi has not come to his house for 5-6 years. He has further stated that he knows accused Gajpal Singh and Prem Singh, who belong to his village. The occurrence took place on 16.08.1989 at 11:00 P.M. He was in his house. He heard the noise of Smt. Darshani Devi and her mother-in-law. On hearing the noise, he went to the house of Smt. Darshani Devi. Smt. Darshani Devi told him that some thieves had entered her hosue and then he went to call Umed Singh and when he returned along with Umed Singh, he saw accused Prem Singh running away from the house of Smt. Darshani Devi. He again inquired from Smt. Darshani Devi about the occurrence then she told him that she was like the mother of Prem Singh and on this Prem Singh went from her room. Smt. Darshani Devi had also told him that thereafter, Gajpal Singh came

and beat her and committed rape with her. The blood was oozing from the nose of Smt. Darshani Devi. Next day Smt. Darshani Devi made a complaint to the Pradhan about the said occurrence.

11. P.W. 3 is Indra Singh, who has stated that he is the Pradhan of village Kyark. The accused and Smt. Darshani Devi belong to his village. He was also Pradhan of the village on 16.08.1989. Smt. Darshani Devi is living along with her mother-in-law and no one was living there except the two. Smt. Darshani Devi had made a complaint to him about the said occurrence. He proved the written complaint as Ex.ka-2 and on the said Complaint, he summoned Gajpal Singh and Prem Singh but they did not come to him, then he sent a report to Sub Divisional Magistrate with a request for taking appropriate action against Gajpal Singh and Prem Singh. He has proved his report as Ex.ka-3 and the original of Ex.Ka-3 was given to Smt. Darshani Devi.

12. P.W.4 is Umed Singh, who has stated that he knows Smt. Darshani Devi, who belongs to his village. Smt. Darshani Devi lives along with her blind mother-in-law and his house is situated upwards from her house and there is a street in between. A thoroughfare runs through the house of Smt. Darshani Devi. On 16.08.1989 at 11-12- P.M. when he was sleeping inside his house, Gajendra Singh had come and informed him about the cries coming out from the house of Smt. Darshani Devi. On the information given by Gajendra Singh, he went to the house of Smt. Darshani Devi along with Gajendra Singh and saw accused Gajpal Singh and Prem Singh running away from the house of Smt.

Darshni Devi in the torchlight. Smt. Darshani Devi also told him that Gajpal Singh and Prem Singh had come to here house and also told him that Prem Singh went out from her room and accused-appellant Gajpal Singh had committed rape with her. A Panchayat of the village people was held in this regard and the accused persons were called but they did not come, then the Pradhan told Smt. Darshani Devi for initiating proceedings in the court. The blood was oozing form the nose of Smt. Darshani Devi.

13. P.W. 5 is Dr. Mayank Upadhyaya, who has stated that on 25.08.1989 he was posted as Medical Officer, District Hospital. On that day he issued a medical certificate in his own hand writing and he signed on it. On that day i.e. 25.08.1989, Smt. Darshani Devi was medically examined by him at 9.00 A.M. and the victim was brought by the Gram Pradhan Indra Singh. He found the following injuries on the body of victim:-

- (i) Complain of pain over scalp in its center.
- (ii) Complain of pain over left side of cheek over molar prominence in an area rounded in shape 3" x 3" contains scaliered small, recently healed scars.

Ext Genetalia Normal.

Viginal Examination- No tear or injury seen.

Vagina admitting index finger easily.

14. Dr. Mayank Upadhyaya has further stated that in his opinion injury no. 2 is about 7-10 days old, caused by blunt object or objects and simple in nature. Patient is habitual to sexual intercourse. He has proved Ex.ka-4 and has further stated that injury no.2 could be caused by biting.

15. P.W. 5 is Garib Dass, Patwari (Investigating Officer), who has stated that on 27.08.1989 he was posted as Patwari at Chowki Circle Chandrapuri, District Chamoli. On 27.08.1989, he received an order dated 25.08.1989 passed by learned C.J.M. for registering the case under Sections 354/376 I.P.C. The order of the C.J.M. is Ex. Ka-5. He also received copy of report i.e. Ex. Ka-1, copy of report sent to Sub Divisional Magistrate by the Gram Sabha i.e. Ex. Ka-3 and medical report of Darshani Devi i.e. Ex. Ka-4 along with the order of C.J.M. In compliance of the order of learned C.J.M., he prepared a *Chick* report on the basis of F.I.R., the *Chick* report is Ex. Ka-6. The entry was made in the G.D. on 27.08.1989, the copy of G.D. is Ex.Ka-7. He also recorded the statements of the victim and other witnesses during the course of the investigation. He proved the site plan i.e. Ex.Ka.8 prepared by him and the memo EX. Ka-9. He also proved the articles (petticoat, blouse, swatter and 23 pieces of broken glass bangles of the victim) marked as Exs. 1 to 4. After completing the investigation, he submitted the charge sheet on 28.04.1990 and proved the same as Ex.Ka-10.

16. After that the statement of appellant and co-accused were recorded under Section 313 Cr.P.C. who denied the allegation made against them and in defence they did not produce any oral or documentary evidence.

17. Sri Lokendra Dobhal, leared counsel for the appellant has submitted that in the instant case there is solitary evidence of Smt. Darshni Devi against the appellant and rest of the witnesses are not the eye witness and are only formal witnesses. Learned counsel

for the appellant has further submitted that the solitary evidence of Smt. Darshani Devi does not inspire confidence. Hence on the basis of this sole evidence, which does not inspire confidence, it would be unsafe to convict the accused-appellant. In support of his argument, he has cited a judgment rendered by the Hon'ble Supreme Court in the case of **Joseph v. State of Kerala** reported in (2003) 1 SCC 465 and relied on para 13 which is quoted below:-

“13. To our mind, it appears that the High Court did not follow the aforesaid standard but went on to analyse evidence as if the material before them was given for the first time and not in appeal. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eyewitness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eyewitness, it should be wholly reliable. Even though such witness is an injured witness and his presence may not be seriously doubted, when his evidence is in conflict with other evidence, the view taken by the trial court that it would be unsafe to convict the accused on his sole testimony cannot be stated to be unreasonable.”

18. Learned counsel for the appellant has further submitted that the victim Smt. Darshani Devi was major aged about 19 years at the time incident as has been shown in her statement and in the medical report also, the age of victim Smt. Darshani Devi has been shown 20 years. Hence, it is clear that Smt. Darshani Devi was

major at the time of occurrence and she was consented party as she herself has stated in her statement that accused-appellant Gajpal Singh and co-accused Prem Singh belong to her Village. The whereabouts of her husband was not known for two and half years. Her mother-in-law, who was blind, was living in her house alongwith her and no one was living there except the two and she was illiterate. She has further stated that the occurrence had taken place about one and half years before in the night. At that time she was preparing food in her house and Gajpal Singh and Prem Singh had reached there. Both Gajpal Singh and Prem Singh took liquor in her house and her mother-in-law also took liquor along with Gajpal Singh and Prem Singh. Thereafter Gajpal Singh took meal and went in the room situated at the first floor of her house. She has further stated that Gajpal Singh came to her room and committed rape with her. Hence, Smt. Darshani Devi was a consented party and the statement given by her creates doubt in the prosecution story.

19. Learned counsel for the appellant has further submitted that the occurrence had taken place on 16.08.1989 and the application under Section 156 (3) Cr.P.C. was moved on 25.08.1989 but nowhere it has been shown that the Patwari concerned had refused to lodge the F.I.R. of the victim. Instead of moving the application under Section 156 (3) Cr.P.C., the victim should have firstly lodged the F.I.R. with the Patwari concerned and on refusal of the Patwari to do so, the victim should have initiated the proceedings under 156 (3) Cr.P.C. In addition to that, the victim moved the application under Section 156 (3) Cr.P.C. on 25.08.1989

and the F.I.R. was lodged on 27.08.1989 on the direction of learned C.J.M., as such there is eleven days delay in lodging the F.I.R. and the prosecution has not explained the delay in lodging the F.I.R. by sufficient cause, which is fatal for prosecution. In support of his submission, learned counsel for the appellant has cited a judgment rendered by the Hon'ble Supreme Court in the case of ***State of Karnataka v. Mapilla P.P. Soopi*** reported in (2003) 8 SCC 202. He has relied on para-4 which is as follows:-

“Undue delay in lodging the complaint without acceptable evidence has also contributed to the doubt in the prosecution case. Hence, the High Court was justified in allowing the appeal.”

20. From the evidence discussed above, it is clear that there is a solitary evidence of Smt. Darshani Devi against the appellant and her statement is also not reliable and believable and does not inspire confidence. Thus, as per the decision of Hon'ble Apex Court rendered in the case of *Joseph v. State of Kerala (supra)*, the solitary evidence should be accepted with caution and the conviction can be made on the solitary evidence only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence but in this cases the solitary evidence of Smt. Darshani Devi is not cogent and reliable, as such the conviction of the appellant cannot be made on the basis of solitary evidence which does not inspire confidence.

21. Considering the totality of circumstances and the evidence of victim Smt. Darshani Devi, it also comes out that the victim Smt. Darshani Devi was a consented party as the appellant had gone to her house at 8.00 P.M. and remained there up till 11.00 P.M. and had also taken liquor along with her mother-in-law. The victim had also provided meal to the appellant after preparing the same and thereafter they started chatting with love and affection. After that, as per the statement of the victim Smt. Darshani Devi, the appellant committed rape with her.

22. Thus, from the circumstances narrated above, it reveals that the appellant committed a sexual intercourse with the victim with her own wish and not against her wish and she was major of about 19 years as stated in her statement and 20 years of age has been shown in the medical report. Moreover, the medical evidence has also not supported the evidence of victim Smt. Darshani Devi and if the medical evidence is ignored at all, only sexual intercourse was done with the consent of the victim and no case under Sections 354 and 376 I.P.C. is made out against the appellant.

23. From the evidence discussed above and the judgment (supra) cited above, it is also clear that the delay in lodging the FIR has not been explained by the prosecution and it creates doubt in the prosecution story. Under these circumstances, for the fact that the delay in lodging the FIR which has not been explained by the prosecution, the benefit of doubt will go to the accused.

24. After considering all the facts and circumstances of the case as narrated above and the dictum made by the Hon'ble Apex Court in the aforesaid judgment, the judgment of the court below is not justified and correct, as per the law and the evidence available on record and the appellant Gajpal Singh is liable to be acquitted.

25. Accordingly, the appeal is allowed. Judgment and order dated 29.11.1991 passed by Sessions Judge, Chamoli at Gopeshwar in Sessions Trial No. 15 of 1991 as well as the conviction and sentence made against appellant Gajpal Singh in the above said Sections is hereby set aside.

26. Since appellant Gajpal Singh is on bail, as such he need not to surrender. His bail bonds are cancelled and sureties are discharged.

(Dharam Veer, J.)

11.12.2007
RBS